and his wife were domiciled in A. He left her and secured a divorce upon constructive service in B. The wife married a New York citizen, who later brought suit against her to annul this marriage. The court held that the decision should depend upon the effect which A would give to such a divorce,[11] although New York would not recognize a divorce so obtained against one of its citizens.[12] The right here sought to be enforced is the status of the second marriage. This right depended upon the law of A. It is obvious that the court could not decide properly as to the right created in another jurisdiction without taking into consideration all the law which would there be applied. In addition, this view of the question has the important practical benefit that the woman considered divorced at her domicil will not be considered elsewhere as married, and *vice versa*.

TITLE TO PERSONALTY BY ESTOPPEL. — A purports to sell a chattel to B. It is well settled that — unless exceptional circumstances make the transaction the equivalent of a quitclaim — A's conduct impliedly involves an assertion that he has title to the chattel.[1] The assertion or warranty has two aspects: (1) a representation of fact; and (2) an assumption of liability in case the representation is not true.[2] Suppose that at that time A is not the owner of the chattel but later acquires title thereto. It seems quite clear that as between himself and B he cannot be heard to say that the after-acquired title did not promptly inure to B's benefit.[3] *A fortiori* he is thus estopped if the assertion of title is express. So far it is practically immaterial whether by virtue of the estoppel "title passes" from A to B or not. The same results are predicated in either case. But if innocent third parties have claims to the chattel as against A, then it is at once important to know whether legal title passed to B in such wise as to protect B against these claims.

If the subject matter of the sale be land and the representation or warranty be expressed in the deed, the weight of judicial opinion — subject to some dissent because of an inconsistency of the rule with the

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[11] It should be noted that the principal case does not raise the question of a court applying some internal law other than that of the country to whose law its conflict-of-laws rule directed it, but does raise the question of the *renvoi* doctrine as broadly stated, assuming that the rule as to recognition of a divorce rendered at the domicil of only one party is a rule of the conflict of laws.

[12] People *v.* Baker, 76 N. Y. 78 (1879); Olmsted *v.* Olmsted, 190 N. Y. 458, 83 N. E. 569 (1908).

[1] See WILLISTON, SALES, §§ 218–220.

[2] These different aspects are illustrated in the rule allowing an action for breach of warranty to be either in tort as upon a false representation or in contract as upon the undertaking of responsibility. See Farrell *v.* Manhattan Market, 198 Mass. 271, 274, 84 N. E. 481, 485 (1908).

[3] See WILLISTON, SALES, § 131. *Accord:* as to sale of a trade secret, Vulcan Co. *v.* The Amer. Can Co., 67 N. J. Eq. 243, 58 Atl. 290 (1904). Perhaps the most accurate statement is that A is estopped to deny that he had title at the time of the original sale. As A does not hold any title under B he can assert none against him, for such an assertion would rest upon facts inconsistent with those which he is bound to admit as true.

theory of the registry system[4] — is that B will hold free and clear of all such claims as did not attach prior to or at the very moment when A acquired title. Thus, although if A obtain title from X by fraud, X's right of rescission will prevail even against B,[5] nevertheless, if A take free of all incumbrances and equities, no conveyance which he may thereafter make, even though to a *bona fide* purchaser, can affect the now fixed rights of B.[6] The title "shoots" into B at the moment of its acquisition by A and is therefore beyond the power of A to subject it to adverse rights. The *modus operandi* of this doctrine, commonly called estoppel by deed, has been variously stated as (1) a transfer of title by estoppel resting upon the false recital in the deed; [7] or (2) a specific enforcement at law of the promise to convey implied in the covenant of warranty; [8] or (3) "a technical effect of a technical representation." [9] On any alternative it is an extraordinary rule, altering the title to land in a way which must find its support apart from the general principles of conveyancing.

A diversity makes the question as to chattels a different problem and paves an easier way to even broader results. Title to land cannot pass by mere assent of the parties. Title to most kinds of personal property, however, can do so as between vendor and vendee, and when the necessary change of possession [10] has been consummated the efficacy of the sale is not confined to disputes in which they alone are interested. In the attempted sale of a chattel from A to B, the former for consideration assents once for all [11] to B's having title thereto. If then, when A acquires

[4] Calder *v.* Chapman, 52 Pa. St. 359 (1866). See RAWLE, COVENANTS FOR TITLE, 5 ed., § 259.

[5] Eyre *v.* Burmester, 10 H. L. Cas. 90 (1862).

[6] Ayer *v.* Phila., etc. Face Brick Co., 159 Mass. 84, 34 N. E. 177 (1893). See RAWLE, *op. cit.*, §§ 248, 252, 259.

[7] See Nelson, J., in Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 325–326 (1850); Jessel, M. R., in General, etc. Co. *v.* Liberator, etc. Society, L. R. 10 Ch. 15, 22 (1878); Buckley, L. J., in Poulton *v.* Moore, [1915] 1 K. B. 400, 413.

[8] See RAWLE, *op. cit.*, § 250. This explanation of the rule is doubted by the learned author. *Id.*, § 251.

[9] Holmes, J., in Ayer *v.* Phila., etc. Face Brick Co., *supra*, at 86.

[10] Three classes of cases are to be distinguished. In two of them, — (1) where the sale is attacked by a creditor of the vendor, and (2) where there is a claim by a subsequent purchaser from the vendor who had remained in possession — the question of change of possession is significant, although the jurisdictions vary in the accuracy with which the two are distinguished. See WILLISTON, SALES, § 349 *et seq.* But (3) change of possession does not seem necessary to pass title as against persons having a prior claim against the vendor. Therefore in cases of personalty a result opposite to that reached in Eyre *v.* Burmester, *supra*, may be expected even without change of possession. *Cf.* Frazer *v.* Hilliard, 2 Strob. (S. C.) 309 (1847). And *a fortiori* where there is change of possession. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307 (1832).

[11] A's apparent assent apparently continues.

But it may be suggested that before acquiring title A may unequivocally notify B that his assent is for the future recalled. If so, (1) in a controversy between A and B this will avail A nothing, as he is estopped to deny that he had title from the outset; (2) in a controversy between B and a subsequent purchaser from A the case is more doubtful. If in this latter case B has possession, his position is much like that of the buyer in a conditional sale after the condition has been performed. The transfer of possession may be said to have been accompanied by an indefeasible right to acquire title: in the conditional sale, by the performance of the condition — see WILLISTON, SALES, § 331; in the case here put, upon the acquisition of title by A.

title, B or some one holding under him has possession or obtains it before rights of third parties intervene, it is not difficult to say that a title passes good against all persons as to whom B is a purchaser for value and without notice. This view of the transaction dispenses with the question whether the analogy of estoppel by deed is to be taken over into this branch of personal property law. But there are a respectable number of decisions which reach this result in cases of sales [12] and pledges [13] upon the theory or language of the last mentioned analogy.[14] And this analysis is not here objectionable provided it be recognized that the requirement of change of possession as against subsequent purchasers and creditors is not to be dispensed with in this way.

But the analogy of estoppel by deed passing title to after-acquired realty is obviously inapplicable to many cases. The alternative explanation suggested above may be tested by applying it to such a case. If it should appear to be a generally workable theory for other cases in which heretofore resort has been had to "estoppel *in pais*," then the validity of its application as presented above is strengthened. Suppose A owns jewels but knowingly permits X to hold himself out as owner or as authorized to sell them, and B buys in reliance upon the apparent situation. Once there has been the requisite change of possession to B or his successors in interest, it ought to be clear that A cannot thereafter affect the title to them even by an attempted sale to a *bona fide* purchaser.[15]

In other words there may be an irrevocable assent, and this would eliminate the use of estoppel in the solution of (1) *supra*. Then the question remains whether transfer of possession is necessary to have this irrevocable assent. It is submitted that it should be necessary only to the extent that it is necessary against third persons in all cases of sale.

[12] Whitehorn Bros. *v.* Davison, [1911] 1 K. B. 463; The Idaho, 93 U. S. 575 (1876); Rowley *v.* Bigelow, *supra*; Frazer *v.* Hilliard, *supra*; Gookin *v.* Graham, 5 Humph. (Tenn.) 480 (1844). See also Davis *v.* Tingle, 8 B. Mon. (Ky.) 539, 543 (1848). *Cf.* Coolidge *v.* Ayers, 76 Vt. 405, 57 Atl. 970 (1904).

In The Idaho, *supra*, and Rowley *v.* Bigelow, *supra*, goods were delivered to carriers and thereby appropriated to bills of lading which had been previously issued and negotiated. There were therefore no specified goods until the date of delivery and to justify the decision on any ground it is necessary to presume the buyer's assent to the appropriation. In Frazer *v.* Hilliard, *supra*, however, the goods were specified from the beginning of the dealings although they were not owned by the seller until after the giving of the delivery order by which he attempted to transfer title. And in the other cases, which did not involve transfers by documents of title, there was the assent of both parties to the purported sale.

[13] Blundell-Leigh *v.* Attenborough, [1921] 3 K. B. 235. For the facts of this case, see RECENT CASES, *infra*, p. 471. *Accord*, Goldstein *v.* Hort, 30 Cal. 372(1866).

[14] In the case of chattels the sale will usually contain the equivalent of both recital and covenant. Thus most of the decisions would not require a discussion of which of three explanations of the doctrine of estoppel by deed is applicable. But the third explanation may well be eliminated on the ground that there is not the historical background in the law of personal property which probably in the law of real estate called forth Judge Holmes' version. And the second theory, while rational when applied to pledges or other security transactions, breaks down when applied to the ordinary case of a sale of a chattel, a contract for which is not usually specifically enforceable. Therefore if the land analogy is to be used it may probably be best rested upon the anomalous basis of a transfer of title by estoppel, which seems to prevail in England. The English view has also especial weight in that it is in a jurisdiction where the question as to land is not complicated by the registry system.

[15] The question is badly confused by the formula that an estoppel binds the person primarily estopped and his privies, and the lack of accord as to who are "privies"

And yet this is a situation quite different from that of the case first put above. Here A has never entered into the relation of sale at all. But is there not an ample substitute for his actual assent? [16] It is reasonably apparent assent that is significant in contractual relationships.[17] And is not A's representation — whether by silence or positive affirmation — the equivalent from B's point of view of saying that A assents to the transfer by X of any interest which A has in the jewels? If this is so, the coincidence of assent of the owner and the change of possession effect a change of title precisely as in the first case above, and no adversion to estoppel is necessary to explain those results. It is admitted that this is not the language of the decisions; but it is suggested as a justification of them which does not partake of the somewhat nebulous nature of doctrines of "estoppel."

LABOR ORGANIZATIONS AND THE ANTI-TRUST LAWS. — A crucial problem of labor-union development was presented in the case of *Borderland Coal Corporation* v. *Gasaway*.[1] A West Virginia corporation sought an injunction on the ground that a combination to unionize the non-union coal mines of West Virginia and so to destroy their competitive advantage in the interstate bituminous coal market was in violation of the Sherman Act. In the District Court, Judge Anderson enjoined all unionization regardless of the methods employed, and enjoined the Central Competitive Field operators from collecting union dues under the check-off system. The Circuit Court of Appeals held that the injunction was too broad, since it included legitimate activities of the United Mine Workers, and that it should be confined to specific illegal methods of unionization, such as violent destruction of property, intimidation of employees, or inducing employees to violate "yellow dog" contracts.[2] The injunction against the check-off was also removed.

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within the meaning of the rule. See EWART, ESTOPPEL, pp. 195 *et. seq.* It is said that, "It is not the office of an estoppel to pass a title." See BIGELOW, ESTOPPEL, 5 ed., p. 609. But it is significant that Mr. Bigelow, whose thesis seems to be that a *bona fide* purchaser from the estopped owner is not bound by the estoppel, qualifies his example of this: "If a person stand by and allow his goods to be sold as the goods of another to one *who does not take possession*." See BIGELOW, *op. cit.*, p. 609. Italics are taken from Mr. Ewart's quotation of the passage. See EWART, ESTOPPEL, p. 203.

[16] Mr. Ewart distinguishes cases where (1) there is an inference that the owner is an actual party to the sale, and (2) there is only a representation. See EWART, ESTOPPEL, pp. 196, 248–249. This tends to answer the question in the negative.

[17] See WILLISTON, SALES, § 5.

[1] Borderland Coal Corporation *v.* Gasaway, U. S. (Dist. Ct. Ind.), decided Oct. 31, 1921, and Gasaway *v.* Borderland Coal Corporation, U. S. Circ. Ct. of Appeals. (7th Circ.), decided Dec. 15, 1921. Both opinions may be found in the CHICAGO LEGAL NEWS for Dec. 22, 1921. For the facts of this case see RECENT CASES, *infra*, p. 474.

[2] In setting forth the proper scope of the injunction the Circuit Court limits the application of the much discussed case of Hitchman Coal Co. *v.* Mitchell, 245 U. S. 229 (1917). See 31 HARV. L. REV. 648; 27 YALE L. J. 779. The court construes the "yellow dog" contract as requiring the employee merely to quit work if he joins the union, and therefore it refuses to enjoin propaganda seeking to have miners employed at will sever connection with their employer and openly join the union.